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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 41

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, THE NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, THE CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Motion to Affirm

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the appellees noted in the margin*

* Board of Public Utility Commissioners of the State of New Jersey, The State of New Jersey, Bergen County, New Jersey, Rockland County, New York, The New Jersey Municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, and the Citizens United Transit Committee, an unincorporated association.

move that the judgment of the District Court be affirmed on the ground that the questions raised by the appellant are so unsubstantial as not to warrant further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge District Court entered December 31, 1957, pursuant to 28 U.S.C. 1253, which set aside, annulled and permanently enjoined the enforcement of an order and certificate issued by the Interstate Commerce Commission, in Finance Docket No. 18781, dated May 15, 1957. The order and certificate purported to authorize the abandonment of the passenger ferries operated by the appellant across the Hudson River between Weehawken, N. J., and New York City, N. Y., without the simultaneous abandonment of the freight ferries operated by the appellant between the same cities. The Commission had ruled that the passenger ferries are "individual extensions of lines of railroad," separate and distinct from the appellant's freight ferries, and that the Commission therefore had jurisdiction, under Section 1(18) of the Interstate Commerce Act, to entertain the appellant's application for the said certificate.

The Board of Public Utility Commissioners of the State of New Jersey, and the State of New Jersey, filed in the District Court of the United States for the District of New Jersey a petition for review of the order of the Interstate Commerce Commission. The other appellees intervened as plaintiffs, and the appellant intervened as defendant.

The District Court, having heard and duly considered the pleadings, the evidence and the briefs and arguments of counsel, and having taken the cause under advisement, rejected the thesis of the Commission that the said ferries are "individual extensions of lines of railroad" and held that the appellant's passenger and freight ferries between

Weehawken and New York City are collectively the final portion of the appellant's line of railroad between Albany, New York and New York City by way of Weehawken. Applying pertinent decisions of this Court, and of the Commission itself, with respect to partial discontinuance of operations over a line of railroad or a portion thereof, the District Court reached the conclusion that the certificate granted to the appellant for abandonment of its passenger ferries without simultaneous abandonment of its freight ferries was in excess of the statutory powers of the Commission and must be set aside.

The Court expressed serious doubts as to the adequacy of the Commission's findings of fact on the question of public convenience and necessity and of the support of those findings by substantial evidence, but, because of its definitive conclusion that the Commission was without jurisdiction to entertain and grant the appellant's application, the Court did not pass upon that point.

ARGUMENT

The decision of the District Court presents no question of substance warranting further argument in this Court.

It is well settled by decisions of this Court and of the Interstate Commerce Commission that the power of the Commission, under Section 1(18) of the Interstate Commerce Act, to authorize the abandonment of a portion of a line of railroad does not include the power to authorize partial discontinuance of service over a portion of a line of railroad.

The correctness of the District Court's conclusion that the rule established by these decisions is applicable to the appellant's passenger and freight ferries, as the final portion of the appellant's line of railroad between Albany,

New York, and New York City by way of Weehawken, New Jersey, is clearly demonstrated in the Court's opinion. This division of the appellant railroad is a line of railroad between Albany, New York and New York City; the passenger and freight ferries between Weehawken, New Jersey and New York City constitute a portion of that line of railroad.

The application of the above-mentioned decisions to the passenger and freight ferries operated by the appellant across the Hudson River raises no question of national importance.

The District Court's decision was made with obvious care and with full appreciation of the standards of review laid down by this Court.

I. Abandonment versus Partial Discontinuance of Service

As stated by the District Court (App. A-2), "the sole source of authority claimed by the Commission and urged by the carrier" for the issuance of the order and certificate against which the appellees sought relief "is Section 1, Paragraph 18, of the Interstate Commerce Act, inserted by 41 Stat. 477," the Transportation Act of 1920. The said paragraph, as incorporated in 49 U.S.C. §1(18), reads as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience

> and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * *" (Emphasis supplied).

The cases in which this Court has held that elimination of part of the service of a portion of a line of railroad is not abandonment of a portion of a line of railroad within the meaning of the said paragraph, include the following, which were cited by the District Court (App. A-4, A-6); *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); and *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341 (1951). The *Palmer* decision was cited by a three-judge District Court in *Banta* v. *United States*, 152 F. Supp. 59, 60 (D. N. J. 1957), in connection with the statement that "it was agreed between the parties that the Interstate Commerce Commission has no authority to allow a railroad to discontinue an individual interstate train." The judgment of the District Court, rejecting "the novel contention" that the Commission has such authority under a section of the Act other than Section 1, was affirmed by this Court in a *per curiam* opinion, Case No. 506, November 12, 1957, 355 U. S. 33, 34.

The first of the twelve decisions of the Interstate Commerce Commission to the same effect cited by the District Court in the instant case (App. A-5, A-6) was issued in 1925 and may be regarded as involving "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S.

294, 315. The last of these decisions so cited was issued in 1954. The twelve decisions reflect a well-considered and long-established administrative interpretation of Section 1(18) of the Act.

Regarding *Morris and Essex Railroad Co. Abandonment*, 175 I.C.C. 49, 52 (1931), one of the most striking of the decisions just mentioned, the District Court said (App. A-5): "* * * the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance * * * The Commission recognized its jurisdiction over the first part of the application but, holding [that] it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request".

The four cases in which the Commission issued certificates, between the years 1941 and 1954, purporting to authorize abandonment of trans-Hudson passenger ferries operated by railroad companies which continue to operate trans-Hudson freight ferries, do not reflect a well-considered or long-established administrative interpretation of Sections 1(18-20) of the Act.

(a) The jurisdiction of the Commission was not challenged in any of those four cases.

(1) In *Central Railroad Company of New Jersey Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941), the applicant sought authorization "to abandon a portion of its line of railroad consisting of a ferry between Jersey City, Hudson County, N. J., and West Twenty-third Street, New York, New York County, N. Y." No objection to the application was offered. The Commission, in its report, made no express finding of jurisdiction under Section 1(18) of the Interstate Commerce Act. It noted that the operation of the railroad's remaining passenger ferry (the

Liberty Street ferry) on a 24-hour basis would relieve to a large extent whatever inconvenience might be suffered by patrons of the line to Twenty-third Street.

(2) In *Erie Railroad Company Ferry Abandonment*, 252 I.C.C. 659 (1942), the applicant sought authorization "to abandon the Erie System ferry between Jersey City and West Twenty-third Street, New York City". The Commission's report contains the statement that the applicant's ferry service to New York City is performed by a pool of seven vessels and that operation of the applicant's Chambers Street ferry is to be continued with an additional boat to be operated throughout the day. It contains no express finding of jurisdiction under Section 1(18) of the Interstate Commerce Act.

(3) The third case, *Hoboken Ferry Company et al. Abandonment*, 257 I.C.C. 51 (1946), relates to one of the three passengers ferries that were operated by the Delaware, Lackawanna and Western Railroad Company, until 1946, between that company's Hoboken terminal and New York City: to Twenty-third Street, Christopher Street and Barclay Street, respectively. The ferry involved in this case ran to West Twenty-third Street. The Commission stated in its report that the Lackawanna was using, on its three "ferry lines or routes", a pool of 13 vessels (24 hours a day to and from Twenty-third Street, 5 A.M. to 9 P.M. except Sundays to and from Christopher Street, and 5:30 A.M. to 12:30 A.M. daily to and from Barclay Street) and that, if abandonment of the Twenty-third Street ferry was permitted, the Lackawanna proposed to operate the Christopher Street ferry 24 hours a day and place an additional boat in service on that route. The report does contain an express finding that the Twenty-third Street ferry was a line of railroad within the meaning of Section 1(18) of the Act and that "the proposed abandonment" was subject to the jurisdiction of the Commission under the said section.

This finding was made in view of the suggestion of the *applicants* that the discontinuance of the Twenty-third Street ferry might be regarded as a transfer of service to Christopher Street rather than as an abandonment of the Twenty-third Street ferry. The Commission held, quoting syllabus No. 1 of *Atchison, T. & S. F. Ry. Co.* v. *Railroad Comm. of California*, 283 U. S. 380 (1931) that its approval must be obtained, under the head of "rearrangement, extension and abandonment of tracks, and the use of the terminal facilities", even if "the proposed abandonment" were considered as merely "a relocation of terminal facilities in New York City".

(4) *Delaware, Lackawanna & W. R. R. Ferry Abandonment*, 290 I.C.C. 809 (1954), affirmed in *Board of Public Utilities Commissioners* v. *United States*, 132 F. Supp. 379 (1955), involved the above-mentioned Christopher Street ferry. The report of the Commission in this case was not printed. It appears from the decision of the three-judge District Court which affirmed the order of the Commission authorizing abandonment of the Christopher Street ferry that the applicant undertook to continue to operate the Barclay Street ferry around the clock. The District Court in the instant case, including one of the judges who sat in the *Lackawanna* case, states that the Commission's jurisdiction was not challenged in the latter case, was never before the Court and was not passed upon by the Court in that case (App. A-4).

(b) The first of these cases was decided twenty-one years after the adoption of the provision of the Act by which the Commission was given jurisdiction in matters of abandonment. The element of contemporaneousness of interpretation was therefore absent.

(c) Upon consideration of these four cases together it appears that the Commission exercised jurisdiction somewhat absent-mindedly in the first two cases; that its ex-

press finding of jurisdiction in the third case was based largely upon the consideration of instances in which, as stated in its report of September 27, 1956, in the instant case (App. B-10), "the discontinuance of a particular service over a line of railroad would result in the trackage involved no longer being required for use in interstate commerce"; without any examination of whether "trackage", toward which the carrier has a maintenance responsibility, is fairly equivalent to a waterway toward which the carrier has no maintenance responsibility, and that it did not in any of these four cases consider the significance of the fact that an extension of the line of railroad of a railroad which holds itself out as a common carrier of persons and goods must include equipment for the carriage of both persons and goods. The last-mentioned fact does not appear to have been brought sharply into focus in any of these four cases. It may well be that State authorities and interested individuals and communities did not have the necessary incentive to point out the implications of this fact so long as each successive discontinuance of service by one passenger ferry was accompanied by an undertaking of the railroad to increase service by one or more remaining passenger ferries. It is only when a railroad proposes to discontinue its passenger ferry service altogether that those who depend upon such service are aroused to the point of challenging the statutory power of the administrative body which purports to authorize the discontinuance of such service.

II. Appellant's Passenger and Freight Ferries a Single, Integral Portion of a Line of Railroad

The routes traversed by units of the appellant's floating equipment in the transportation of persons and goods across the Hudson River constitute a single, integral portion of the appellant's line of railroad as extended from its former terminus at the exit from the Weehawken tunnel (App. B-4).

The District Court found as facts, on the basis of the record, that the appellant or its predecessors have furnished railroad passenger and freight service between Albany and New York City by way of Weehawken since 1883; that the single franchise under which the appellant's predecessor operated across the Hudson River called for a unified passenger and freight service; that the allocation of the passenger service to ferry boats and of the freight service to lighters and barges which follow different routes across the river and are accommodated at different docks on the New York side is due to considerations of convenience and to the directions of municipal authorities; and that the appellant intends to maintain its freight service under the above-mentioned franchise while discontinuing its passenger ferries (App. A-2, A-6, A-9).

The District Court held on the law that the final portion of the appellant's line of railroad between Albany and New York City by way of Weehawken is a passenger and freight service across New York Harbor from Weehawken to Manhattan; that the appellant's passenger and freight ferries are no more and no less than the continuance of the West Shore line to New York City; and that the distinctions noted in the Commissioner's opinion between the appellant's passenger and freight services of the one railroad line do not support the Commission's thesis that these services are separate and independent lines (App. A-2, A-9, A-10).

The Commission has jurisdiction over the abandonment only of a line or a portion of a line of railroad. Any contention that the ferry service in question is by definition a line of railroad or a portion of a line of railroad is without substance. It is, moreover, inaccurate and misleading. It is true that, according to Section 1 (3) of the Interstate Commerce Act, the term "railroad" includes ferries used or operated in connection with any railroad. The same

term, however, according to the same section, includes bridges, car floats, lighters, terminals and terminal facilities. It is obvious that neither a car float nor a lighter *is* a line or a portion of a line of railroad, any more than a terminal or a terminal facility *is* a railroad, because each of these instrumentalities or appurtenances is included in the term "railroad" for the purposes of regulation by the Interstate Commerce Commission. It should be equally obvious that a ferry, in the popular sense of a boat is not necessarily a line or a portion of a line of railroad and that, as the District Court pointed out, the distinction between the ferry boats used by the appellant in transporting passengers and the lighters and barges used by it in moving freight is no more significant in this relation than would be the distinction between freight and passenger cars.

A ferry or a bridge used or operated in connection with a railroad cannot be of itself an entire line of railroad. Such a ferry or bridge may be a portion of a line of railroad when it is the connecting link in a line of railroad for the transportation of both persons and goods. *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382 (1932). A ferry so used differs from a bridge so used only in the fact that it may consist of a number of divergent or undefined routes across the water. A ferry so used consists of all the routes traversed by its various units of floating equipment where they terminate in essentially the same locality without affording any intermediate service.

In holding that the human, and vehicular freight ferries operated by the appellant across the Hudson River are no more and no less than the continuance of its line of railroad from Weehawken to New York City, the District Court found support in this Court's decision in the *Claiborne* case. It was noted by this Court that the ferry proposed for the transportation of both passengers and freight,

would be "operated as a part of the Railway's line." 285 U. S. at 392. As pointed out by the District Court (App. A-7), "the Claiborne ferry could handle its freight on the same vessel as the passengers" because "it dealt with a minor traffic condition." Subsequent discontinuance of Claiborne's passenger service would, however, in the Court's opinion, be easily recognized as beyond the jurisdiction of the Commission, since it would obviously have been "only a portion of the service of the ferry extension which was being cancelled."

Appellants rely in their brief upon three other district court decisions which are plainly distinguishable (Appellant's brief, pp. 16, 17). In *Public Service Commission* v. *United States*, 56 F. Supp. 351 (S. D. N. Y. 1944) the termini other than the common terminus of the diverging service were about thirty air line miles apart in different municipalities in different counties. In both *Georgia* v. *United States*, 28 F. Supp. 749 (E. D. Va. 1939) and *In re Long Island R. R.*, 92 F. Supp. 85 (E. D. N. Y. 1950), cases where operation over part of one of two parallel routes of service was discontinued, there were intermediate points, service to which was terminated. The affording of service at intermediate points identifies parallel routes as distinct lines. In all three cases, loss of trackage was involved. In the present case of course no trackage is involved, nor is there service at intermediate points on the routes across the river.

The decision of this Court in *New York Central R. R.* v. *Hudson County*, 227 U. S. 248 (1913), cited by the appellant in indicating its apprehension that State authorities may seek to regulate its trans-Hudson ferries, has no pertinence to the issue involved in the instant case. The case cited was decided seven years before the Commission was vested with jurisdiction to authorize the abandonment of lines of railroad or portions thereof. This Court had no

occasion, in 1913, to consider whether the passenger ferries and freight ferries operated by the appellant as railroad ferries constitute separate extensions or a single extension of the appellant's line of railroad from its former terminus at the mouth of the Weehawken tunnel. The passenger ferries referred to by this Court as railroad ferries, at 227 U. S. 257, are doubtless subject to regulation by the Interstate Commerce Commission to the extent that Congress has vested the regulatory power over rates in the Commission. This case is no authority for a broader assumption of regulatory power by the Interstate Commerce Commission.

III. Relative Importance of the Instant Case

The appellant argues that the issue of jurisdiction decided by the District Court in the instant case is of national importance. It submits that this issue involves conflicting claims of the United States and the States of New Jersey and New York with respect to the regulation of interstate commerce and that on the final decision of this issue may hang the solvency of the appellant and of other companies which operate ferries as connecting links in their lines of railroad.

The question whether the Interstate Commerce Commission has jurisdiction to authorize the discontinuance of passenger ferries operated over an extension of a line of railroad without simultaneous discontinuance of freight ferries operated over the same extension involves conflicting claims of federal and state governments only in a forensic sense. The decision of this case depends upon the determination of the intent of Congress in the adoption of a statutory provision which has been interpreted by an administrative agency of the United States in a way to which the parties, including a state government, which has standing to do so under paragraph (20), section 1 of the

act, *Colorado* v. *United States*, 271 U. S. 153 (1926), object in a court of the United States. The executive and judicial departments of the Government of the United States have certainly no interest in having this statutory provision interpreted and applied in a manner at variance with the intent of the legislative department, which has sole responsibility under the Constitution for fixing the limits of the power that it has delegated to the Interstate Commerce Commission.

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944)

The District Court has discharged its responsibility by deciding the issue of jurisdiction in accordance with the law as it stands. As the Court states (App. A-11), Congress may decide to grant the Commission jurisdiction which it has not yet granted, but "until that time, the Commission, strictly a creature of its creating statute," is, in the Court's opinion, without the power to permit the discontinuance of the partial service rendered by the appellant by passenger ferries across the Hudson River.

The financial solvency of the appellant and of other railroads is, of course, a matter of concern to this Court in any case in which it is shown to this Court that the intent of the Congress to provide procedures for the reduction of burdens on interstate commerce may have been thwarted by the decision of a three-judge District Court. It is submitted that it is clear from a reading of the decision of the District Court in this case that the statutory provision in question has been correctly interpreted and applied by that Court.

In the present case there has been no determination of the profit position of the appellant's combined trans-Hudson passenger and freight operation. The examiner and the commission would not allow evidence of the freight on combined trans-Hudson operations as irrelevant under his and its view of the question whether the passenger ferry service constituted a line of railroad in itself (App. Br. 16). Many statements in the appellant's brief (*e.g.*, Appellant's Brief p. 11) suggest a financial portion verging on bankruptcy without support in the record. It has been held that the profitability of the entire operation of a branch line is to be considered on applications for abandonment or curtailment of service. That the segregated passenger traffic account here shows a deficit would only become significant after a determination that the passenger operation across the river was a line in and of itself. Any reliance by the appellant on the passenger deficit in showing the importance of the case is immaterial in view of the decisive issue as to whether the Weehawken to Manhattan passenger service is a *line* of railroad, the only possible subject of the jurisdiction contended for.

IV. The District Court's Compliance With Proper Standards of Review

The District Court accorded due respect to the Commission's holding that the Commission had jurisdiction in the instant case on the basis of the Commission's conclusion that the appellant's passenger ferry routes are individual portions of lines of railroads.

Appellant urges that the Commission's conclusion should "be accepted if reasonable, even * * * where the Court itself might have reached a different result," citing *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 130-1 (1944). In answer to "a suggestion that the administrative decision construing a statutory term should be treated as conclusive" under the *Hearst* case, this Court has said:

> "The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat 'back pay' as wages; and their expert judgment is entitled, as we have said, to great weight. The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both [the *Hearst* case and another] advert to the limitations of administrative interpretations. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 368, 369 (1946) (in which this Court construed the term in question contrary to the construction of both the administrative agency and the district court).

This Court has applied the rule of the *Nierotko* case to a construction of a statutory term by the Interstate Commerce Commission. *East Texas Lines, Inc.* v. *Frozen Food Exp.*, 351 U. S. 49, 54 (1956). The court, although holding that the determination by the commission that dressed poultry was a "manufactured" commodity was entitled to "great deference because of [the commission's] familiarity with the conditions in the industry which it regulates," upheld the contrary view of the district court since "[a] chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured' commodity." Parodying this language, in effect the district court in the present case has said:

> "An integral line of railroad that crosses a river by convenient means remains an integral line of railroad. Separation of the passengers, express and less than carload lot freight (B-12) onto ferries and the freight onto lighters and car floats at the water's edge

> makes the transportation service attractive to the patron. But we cannot conclude that this process which merely makes the service marketable turns a part of the service on the integral line of railroad into a distinct line."

The *East Texas Lines* case's limited deference to the Interstate Commerce Commission's construction of a statutory term is a reaffirmation of a rule antedating the *Hearst* case. In *United States* v. *Idaho*, 298 U. S. 105 (1936) the question was whether abandonment of a certain nine mile length of track was excluded from the ICC's jurisdiction as a "spur" under paragraph 22 of Section 1 of the Interstate Commerce Act. The commission ruled that it was not. The district court took the opposite view. "The appellants object[ed] that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive * * *." 298 U. S. at 109. But this Court answered: "[W]hether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission." *Ibid.* This court repeated the characterization of the question of construction of statutory limits of ICC jurisdiction as one of mixed law and fact not for conclusive determination by the commission in *Yonkers* v. *United States*, 320 U. S. 685, 689 (1944). The particular issue there was whether a certain line or portion of a line was an "interurban electric railway * * * not * * * part of the steam railroad system" within the exemption of paragraph 22 of Section 1 of the Act.

Earlier it had been held by this Court that one carrier could sue to enjoin as an uncertificated "extension" of a line of railroad what another carrier considered merely an exempt "industrial" track under paragraph 22. The evaluation of the facts was for the district court. There was no

provision in law for a construction by the commission in such cases. *Texas & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 271 (1926). In a suit between private parties for overtime pay under the Fair Labor Standards Act this Court likewise held that the interpretations of the statutory term by the Administrator afforded "guidance" to the court, but the final determination was for itself. *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). One of the significant factors for evaluating the "weight" attaching to an interpretation by the Administrator was "its consistency with earlier and later pronouncements * * *." 323 U. S. at 140. In the present case, one of the principal reasons for the district court's reversal of the commission's action was because the court found it inconsistent with at least twelve prior decisions by the same commission (App. A-4 to 6).

The thoroughgoing examination by the district court of the commission's jurisdictional finding in the present case (App. A-8, 9) gave it all the weight to which it was entitled, and certainly shows as untrue the appellant's statement that the district court "refused to pay any attention to the ICC holding" (Appellant's brief, p. 13). The principal fact which the commission relied on was that the precise points of termination in New York City of the carriage of freight and the carriage of passengers did not coalesce (App. B-7). "The thought that the passenger and freight traffic do not have the same docks on the New York side" was found insignificant by the district court because "[t]hat municipality controls its waterfront and its water transportation ties up as the city directs" (A-9).

The appellant accuses the district court of "grasping at straws when it sought to support its conclusion by the statement that the passenger ferries are repaired by the same facilities and employees of the Railroad as are used to repair its car floats and lighters" (Appellant's brief, p. 17). What the district court was really doing was giving

due deference to the finding by the commission that "the ferry terminals, docks, vessels, and other facilities and services of the New York Central are maintained physically apart from the car-float and lighter equipment and other facilities used in transporting freight across the river" (B-7). The district court shows that "maintained" here cannot mean "repaired", because the same shops and employees do the repairing of both, as the commission seems to acknowledge when it says "the charges for each are clearly separable according to regular accounting methods * * *" (App. B-7, B-15). The district court then shows that the alternate possible meaning, *i.e.*, that the transportation facilities are physically distinguishable, is no more significant in determining whether a curtailment of service is an abandonment of a line of railroad than that freight and passenger cars are distinct facilities.

The findings of fact of the Commission were fully considered by the District Court and their correctness was not questioned by the Court. It was only the Commission's conclusions of law on the basis of those findings that the District Court rejected. After quoting the findings of fact, the District Court stated in its opinion (App. A-9):

> "The distinctions outlined are without a difference. They fail utterly to indicate any substantial disassociation of the ferry from its rail member. On the whole record they do not support the Commission's thesis that the passenger and freight services of the one railroad line have suddenly become separate and independent lines because they are water-borne across the harbor to the end of the same one original line."

We submit that the Commission's conclusions of law had no reasonable basis in law and that they were rejected by the District Court only after full and respectful consideration.

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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